United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1093

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P/S

UNITED STATES COURT OF /
SECOND CIRCUIT

HAZEL CUTLER,

Appellant,

-against-

CASPAR WEINBERGER, as Secretary of the Department of Health, Education and Welfare of the United States of America,

Appellee.

74-1093

BRIEF OF THE APPELLANT

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- x

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I. PRELIMINARY STATEMENT

This is an appeal from an administrative decision by appellee that appellant is not entitled to disability insurance benefits under 42 U.S.C. §423 (§223 of the Social Security Act).

The United States District Court for the Eastern District of New York (Bruchhausen, D.J.) denied plaintiff-appellant's motion for an order reversing the administrative decision or remanding the case for a new hearing. This appeal is from that decision, which has not been reported.

II. ISSUES PRESENTED FOR REVIEW

(1) Is the finding of the Secretary of Health, Education and Welfare that appellant is not disabled despite her diabetes, dizziness, amputation of fingers, obesity, and other impairments supported by substantial evidence?

(2) Is the appellant entitled to a remand for a new administrative hearing because she was not represented by counsel, because important evidence was not elicited by the Administrative Law Judge, and because many medical reports are illegible?

III. STATEMENT OF THE CASE

Appellant Hazel Cutler is a 58-year-old woman who has worked as a domestic for her entire life (Record, P. 27). Mrs. Cutler is illiterate, with only a third-grade education received in a Southern segregated Negro school (Record, Pp. 25, 7). She worked "in the fields" in her early years; for the twenty years before she became unable to work, she worked as a domestic servant. She has done no other type of work (Record, P. 27).

Mrs. Cutler filed an application for disability insurance benefits under the Social Security Act in August, 1971, alleging inability to work from March, 1963, because of diabetes mellitus, dizziness, forgetfulness, unsteady walk, and arthritis. The application was denied, as was a request for reconsideration. Mrs. Cutler requested a hearing before an Administrative Law Judge, which was held on October 6, 1972. Mrs. Cutler was not represented by counsel at the hearing, but was accompanied by a social worker from the New York City Department of Social Services, who attempted to represent her. After the hearing, the Administrative Law Judge issued a decision denying Mrs. Cutler's claim for disability benefits. The administrative Law Judge held that Mrs. Cutler did not have a "severely disabling impairment or

impairments" and would be able to return to her usual work (Record, P. 13). The Appeals Council affirmed this decision on February 6, 1973, and adopted it as the final decision of the Secretary of Health, Education and Welfare (Record, P. 40). Mrs. Cutler then brought this action to review the Administrative Law Judge's decision.

The District Court denied appellant Cutler's motion for an order reversing the decision of the defendant Secretary or, in the alternative, remanding the case to the Secretary for a new administrative hearing. This appeal is from that determination.

IV. THE DECISION BY THE SECRETARY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A claimant is entitled to disability insurance benefits under the law

> if his physical or mental impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy.
> 42 U.S.C. 423(d)(2)A
> [emphasis added]

Here the claimant is a 58-year-old illiterate woman, with only a third-grade education, who has held only the most menial and strenuous domestic jobs.

In evaluating the appellant's impairments, the question to be considered is whether these impairments prevent this particular claimant from engaging in the heavy work which she has done in the past.

> The question of whether a claimant is disabled as that term is used in the [Social Security] Act, is an inquiry which must be directed to that particular individual, not to a theoretical average man or even to an average claimant.
> Dillon v. Celebrezze, 345 F.2d 753, 757 (4th Cir. 1965).

Appellant need not be "completely helpless or bedridden" to qualify for benefits, Odom v. Celebrezze, 230 F. Supp.

732, 736 (E.D. S.C. 1964), but must be unable to work at any job available for a person of her age and education.

In Weaver v. Finch, 306 F.Supp. 1185, 1189 (W.D. Mo. 1969), the court summarized the seven standards which must be met if a decision of the Secretary is to be affirmed:

1. The hearing procedures were fair and lawful; Jacobson v. Folsom, 158 F. Supp. 281, 284 (S.D. N.Y. 1957).

2. Evidence was received on the material factual issues; Fenix v. Celebrezze, 243 F.Supp. 816 (W.D. Mo. 1965).

3. The findings of fact are supported by substantial evidence; Celebrezze v. Bolas, 316 F.2d 498 (8th Cir. 1963).

4. The findings of fact are sufficient to resolve the crucial factual issues; Hayes v. Celebrezze, 311 F.2d 648, 654 (5th Cir. 1963); as well as the crucial legal ones.

5. The correct legal standards were applied in determining the ultimate issues; Ferran v. Flemming, 293 F.2d 568, 571 (5th Cir. 1961).

6. All regulations of defendant applied in arriving at the decision were lawful and valid as applied in this case; Marion v. Gardner, 359 F.2d 175 (8th Cir. 1966).

7. It appears in finding the facts that claimant was required to sustain no greater burden of proof than by preponderance of the evidence, the usual burden in administrative proceedings. (See 7(c) Ad. Pro. Act: 5 U.S.C. §566(d).)

Defendant-Appellee's determination cannot meet these standards, and his decision should be reversed, or at least remanded for a new hearing.

(1)

Evidence Exists in the Record Sufficient to Carry Plaintiff's Burden of Proof to Establish Disability.

Substantial medical evidence of disability in the form of medical diagnoses, treatments, and clinical findings appears in the Record and was available to the defendant in making his determination. In evaluating this evidence, it must be emphasized that "in assessing disability, 'all complaints [of a claimant] must be considered together in determining her work capacity' [cite ommited]." Gold v. Sec. H.E.W., 463 F.2d 38, 42 (2nd Cir. 1972). See also Dillon v. Celebrezze, supra; Hicks v. Gardner, 393 F.2d 299, 302 (4th Cir., 1968).*

The Record shows overwhelming evidence that the claimant is disabled under the Social Security Act, because of her diabetes mellitus, loss of fingers on her right hand, constant dizziness, menopause, obesity, and general pain.

*All evidence of disability must be considered, even if obtained after the plaintiff last met the earnings requirement for benefits. "Evidence bearing upon an applicant's condition subsequent to the date upon which the earnings requirements was last met is pertinent evidence in that it may disclose the severity and continuity of impairment existing before the earnings requirement date or may identify additional impairments which could reasonably be presumed to have been present and to have imposed limitations as of the earnings requirement date." Carnavele v. Gardner, 393 F.2d 889, (2nd Cir., 1968), Gold v. Secretary of H.E.W., supra.

(a) Diabetes

Diabetes is a medically determinable disease which can result in a finding of disability under the Social Security Act. See, for example, Whalen v. Ribicoff, 197 F. Supp. 1 (D.C. Mass. 1961); see also 20 C.F.R. 404, Subpart P Appendix Section 9.08. Appellant has suffered from and been treated for diabetes mellitus from 1965 to the present time as the record indicates:

(1) The medical record from the New York City Department of Hospitals indicates a diagnosis of diabetes since 1965 (Record, P. 84, P. 89 [indicating diabetic diet prescribed], P. 91, P. 93, P. 94, P. 97 [indicating patient was taking Diabinese, a medication used for diabetes commonly referred to as "oral insulin"], P. 102, P. 103, P. 104).

(2) The continuation record of the City hospitals indicates that the appellant's medication for diabetes is increased from the 250 mg. dosage to 500 mg. The report notes continued weight gain and 3+ glycosuria (the excretion of sugar in the urine) Record, P. 103).

(3) The Queens General Hospital diabetic summary sheet from 1969 indicates the presence of

peripheral neuritis related to diabetes as well as visual disturbances (Record, P. 108) and indicates considerable worsening of her condition since the 1968 diagnostic statement of the New York Diabetes Association. The June 15, 1967 report of the New York Diabetes Association had also reported that the plaintiff has "visual difficulties" (Record, P. 116). Blurred vision is also noted in the report of the disability interview (Record, P. 64).

(4) The August, 1971 report from the Long Island Jewish Medical Center diagnoses "peripheral Neuropathy -- probably diabetic" (Record, P. 129).

(5) The 1970 continuation record of the New York City Hospitals indicates the "prominence of venous markings which are ending in venous lakes" (Record, P. 128). The Neurology Department also noted the presence of occasional parasthesia in fingers and toes (Record, P. 128). Paresthesia is also noted in the report of the Long Island Jewish Medical Center (Record, P. 133). Paresthesia is an abnormal spontaneous sensation in the skin, such as that of burning, pricking or numbness. Paresthesia is not an unusual complication resulting from diabetes and was completely ignored by the hearing law judge in his recital of the evidence.

(6) Finally, the appellant's diabetes is related to her problems with falling. As explained in Gray & Gordy Attorney's Textbook of Medicine (3rd ed. 1973):

> The foot is the most vulnerable part of the body in a patient with diabetes. This is especially true in the older patients who may have had mild unrecognized or poorly controlled disease for many years. Diabetic neuropathy (disorders of the nerves occurring as a complication of diabetes) affects the peripheral nerves to cause a loss in sensation... Because of disturbed proprioceptive sensation in their feet, they may stumble and fall when walking with resultant injury to other portions of the body. §74.11(1) [emphasis added]

Impaired sensation in the plaintiff's ánkles was described by at least one medical report (Record, P. 129). There is considerable evidence in the record that the plaintiff did have a problem with frequent falling (possibly increased by her dizziness) and that she was able to use public transportation only if accompanied (Record, Pp. 29, 30, 33, 68, 145). Of course, this is a most serious difficulty, particularly in the case of a domestic household worker.*

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*The Attorney's Textbook, supra, §74.11(1), mentions slippery floors as an especial hazard for diabetics.

(b) Dizziness

In addition to, and possibly related to the appellant's diabetes and resulting neuropathy, is fairly severe dizziness; cf. Norwood v. Finch, 318 F. Supp. 739, 745 (E.D. Tex. 1970) in which the plaintiff's dizziness was a crucial factor in the court reversing a denial of diability benefits. The record in this case includes numerous diagnoses and other evidence of dizziness:

(1) The report of the Long Island Jewish Hospital indicates dizziness of [illegible] duration (Record, P. 121).

(2) The Long Island Jewish Hospital report of August 23, 1971 notes that patient is "still fairly constantly dizzy; reports feeling of weight over top of head - present for over one year" (Record, P. 124; see also Record, P. 126, 128). In August, 1971, the Long Island Hospital report states that "most of dizziness is postural" and concludes with an impression of "peripheral neuropathy - probably diabetic." The report also suggests, despite some tests to the contrary, that the dizziness may be secondary to neuropathy without postural hypotension (Record, P. 129).

(3) The March 6, 1970 report of Long Island Hospital notes that the appellant was "improved but

still dizzy" and prescribed various drugs to counteract the dizziness (Record, P. 130).

(4) The report of April 17, 1970 indicates appellant was "still dizzy" and changes the prescription to another drug (Record, P. 130).

(5) The Long Island Hospital progress notes of May 1, 1970, are virtually illegible but some information may be obtained:

> Patient states dizziness remains [illegible]. She describes the dizziness as occasionally [illegible] and occasionally by feeling as if she is going to fall backwards. [illegible.] She also gets the dizziness when assuming the upright position and when bending over.

The doctor's impression is "dizziness secondary to vertebral [illegible]," and new medication is prescribed (Record, P. 131).

(6) The report of May 15, 1970, indicates the "dizziness is much improved," as the Administrative Law Judge noted in his decision. He did not note, however, that the improvement was short-lived. While the next few entries are illegible, the report of September 22, 1970 notes "still dizzy" (Record, P. 133). The report of January 8, 1971, indicates the appellant "still complains of vertigo" (Record, P. 135).

(7) One of appellant's former employers submitted a statement that the appellant several times became dizzy while working and had to rest or leave early (Record, P. 137). This was confirmed by a statement of the appellant's daughter who lived with her until 1970 (Record, P. 145). These statements were ignored by the appellee. Statements by a claimant's relatives or friends are relevant and must be considered in evaluating disability. See Smith v. Gardner, 251 F. Supp. 262 (M.D.N.C. 1966), Kennedy v. Finch, 321 F. Supp. 303 (N.D. Fla. 1970), Spivak v. Gardner, 268 F. Supp. 366 (D.C. N.Y. 1966).

(8) Finally, there are the appellant's own descriptions of her dizziness. A claimant's testimony, however inarticulate, may not be ignored. cf. Underwood v. Ribicoff, 298 F.2d 850, 851 (4th Cir. 1962); Grizzle v. Cohen, 297 F. Supp. 790 (W.D. Va. 1969). Appellant testified at her hearing that she was dizzy continuously (Record, P. 28) and that while the medication she takes for her dizziness reduces it somewhat, it does not stop it.

In the face of all the medical and other evidence of continuous dizziness, it was error for the Administrative Law Judge to conclude, apparently based solely on his observation of the appellant during the

hearing, that the appellant does not suffer from dizziness.

(c) Amputation of Fingers

In addition to her other impairments, the appellant's right hand is crippled. She lost three fingers on the hand as a result of an accident over twenty-five years ago. This impairment was dismissed by the Administrative Law Judge who noted only that the claimant "stated that this did not impair her ability to work " (Record, P. 11). While it is true that the appellant did indicate that she could work despite the impairment and "the people was amazed that I work" (Record, P. 39), it was error for the Administrative Law Judge not to consider the effect of this old impairment in combination with the other impairments of the claimant, as the law mandates. Gold v. Secretary, supra.

It was also error to ignore the statement by appellant's former employer that the injury to her hand prevented her from being a fast worker (Record, P. 137). Appellant obviously did compensate for her lack of dexterity in her right hand during the period in which she managed to work. But the additional impairments she developed made such compensation especially difficult, as the statement by plaintiff's employer indicates (Record, P. 137). Compare the case of Whalen v. Ribicoff, supra, in which the combination of diabetes

mellitus and the loss of use of one hand was held to be disabling under the Social Security Act. See also Taylor v. Cohen, 297 F. Supp. 1281 (E.D. Tenn. 1969) in which the loss of fingers on one hand was a factor considered in the court's awarding Social Security disability benefits, even though the amputation occurred in the plaintiff's childhood.

(d) Menopause

The Administrative Law Judge also erroneously ignored the effects of the appellant's hysterectomy and consequent surgical menopause. The record indicates that the appellant had a total abdominal hysterectomy with bilateral salpingo-oophorectomy on May 27, 1965. The operative diagnosis was multiple fiboid uterus with submucous myoma, adenamatosis uteri (Record, P. 83). While menopause produces different reactions in every woman who undergoes it, it can sometimes be seriously disabling. Gray & Gordy, Attorney's Textbook of Medicine, §293.01. See Gilliam v. Gardner, 284 F. Supp. 529 (D.S.C. 1968), overruled on other grounds, Leviner v. Richardson, 443 F.2d 1338 (4th Cir. 1971), in which menopause was held to be a factor in finding a woman disabled who, like the clamant, was uneducated, obese, and had done only strenuous work. See also Leslie v. Richardson, 320 F. Supp. 580 (E.D. Tenn. 1970). In menopause "the neurological phenomena which may occur include such disturbances as vertigo (dizziness or revolving sensation), numbness of fingers (often described by the patient as "dead fingers"), paresthesias (abnormal prickling and tingling sensation) of the hands and feet..." Gray & Gordy, supra, §293.44. All of these symptoms were experienced by appellant with vertigo being particularly

pronounced. It was serious error for the Secretary to ignore menopause as a medically determinable cause of the appellant's impairments.

(e) Obesity

Obesity is another factor in evaluating disability which the Secretary erroneously ignored completely. "Obesity which seems to be a fairly common condition in workers who have been injured or disabled is a consideration not for rejecting their claims for disability benefits, but in explanation why, in many cases employment in a different field is not available to them." Mefford v. Gardner, 383 F.2d 748, 761 (6th Cir. 1967). See also Brown v. Gardner, 251 F. Supp. 770, 772 (D.S.C. 1966), Causby v. Celebrezze, 244 F. Supp. 274 (W.D.S.C. 1965).

The record indicates that the appellant suffers from extreme obesity, probably related to her diabetes. She is only five feet tall and weights one hundred eighty pounds (Record, P. 11). Weight gains are noted in the hospital reports for July 7, 1966 (Record, P. 102), August 26, 1966 (Record, P. 102), September 29, 1966 (Record, P. 103), November 17, 1966 (Record, P. 103), and June 6, 1967 (Record, P. 116). Obesity is diagnosed at several points in the Record (Record, Pp. 113, 115, 118, 119, 120). Appellant's obesity is another significant impairment which, added to her other infirmities, makes her unable to work at any job conceivable for a person of her age and education. It was error for the Secretary to disregard this impairment.

(f) Back Pain

In addition to the other impairments described above, the record in this case indicates appellant suffers from back pain. It is well established that pain may result in a finding of disability; cf. Ber v. Celebrezze, 332 F.2d 293 (2d Cir. 1964); Spivak v. Gardner, 268 F. Supp. 366 (D.C. N.Y. 1966); Marunich v. Richardson, 335 F.Supp. 870 (D.C. Pa. 1971). While the x-rays and objective tests indicate only "minimal narrowing of the invertebral joint space" (Record, P.134) and "minimal weakness hip flexion bilaterally," it is known that menopause often results in arthritis symptoms, in which x-ray findings are minimal or abesent. Gray & Gordy, supra, §§293.47, 293.80(7).

The claimant's own testimony may not be ignored, Grizzle v. Cohen, 297 F.Supp. 790 (W.D. Va. 1967).

(1) At her hearing the appellant testified that she has weakness in her legs which makes her fall (Record, P. 30-31).

(2) The report of the disability interview on August 16, 1971 indicates the interviewer observed the appellant had difficulty walking (Record, P.66). The report of November 3, 1971 indicates the appellant complained of increasing pain and difficulty in moving her arms and walking. See also Record, P. 138.

(3) The hospital report of December 7, 1965, indicates the appellant had complained of low back pain (Record, P. 94). Again on December 27, 1965, the Record indicates (P. 96) complaints of low back pain.

This evidence of pain in moving should not have been ignored by the hearing officer, solely on the basis of lack of objective medical evidence showing more than the minimal findings described above. As is well known, there are no laboratory findings characteristic of degenerative joint disease, and "the extent of x-ray changes furnishes only a very poor and unreliable gauge to the functional impairment caused by degenerative joint disease." James W. Brooke, M.D. Arthritis and the Medical Witness, (1966) Pp. 45-46.

(2)

Appellant Met Her Statutory Burden of Proof to Establish Disability.

As described above, the record indicates overwhelmingly that the appellant satisfied the burden of proof to establish disability. She is not required to prove disability "beyond a reasonable doubt" Gaden v. Gardner, 263 F. Supp. 374 (D.C. S.C. 1967). She has been found totally and permanently disabled by the New York Department of Social Services, which finding, though not binding on the defendant, 20 C.F.R. 464.1525, is entitled to some weight. Compare Melnick v. Finch, 305 F. Supp. 441 (D.C. Pa. 1969) aff'd. 432 F.2d 1004. Appellant is a woman who, in addition to having virtually no education, is of very low intelligence--inarticulate, unable to recall her height (Record, P. 25), her daughter's age, or how long she had been married (Record, P. 34), or recent events (Record, P. 70). According to a Department of Social Services' report, the appellant "looks older than she really is. She walks, thinks and talks very slow..." (Record, P. 138). It is clear that, considering the realities of the world of commerce, no employer would hire or keep the appellant in her condition for any period of time. The finding that she is not disabled is not supported by substantial evidence and should be reversed.

V. IF THE EVIDENCE CONTAINED IN THE RECORD IS NOT SUBSTANTIAL ENOUGH TO GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, A REVERSAL IS MANDATED IN THE INTEREST OF JUSTICE.

The disability hearing is an investigative, fact-finding procedure, utilized on request of a party adversely affected by the Secretary's initial decision, intended to collect all the available relevant evidence of disability to assist the Secretary in making a fair and valid decision. 42 USC §405(b). A study of the transcript of the hearing in the instant proceeding shows that this important function was not fulfilled. If the court does not find the evidence of disability therein contained sufficient to grant appellant's motion for reversal of the decision below, a remand to permit the development of an adequate record is required.

(1)

The Hearing Failed to Adduce All of the Available and Relevant Evidence.

One of the four elements of proof that the courts are required to scrutinize in determining whether a claimant has met his burden of establishing disability is subjective evidence testified to by the claimant. Cf. Underwood v. Ribicoff, 298 F.2d 850, 851 (4th Cir. 1962). Because "the determination of disability is a subjective determination." Kosnosky v. Richardson, 328 F. Supp. 1365, 1369 (W.D. Penn. 1971), the importance of this subjective evidence cannot be over-estimated.

In appellant's hearing, virtually no subjective evidence was adduced by the Hearing Examiner. One searches the transcript in vain for descriptions of plaintiff's pain and physical sensations. As Judge Sobeloff stated for a unanimous Fourth Circuit panel: "'medicine is a notoriously inexact science.' Therefore the objective medical findings...are to be considered not in isolation, but along with the claimant's subjective complaints..." Lackey v. Celebrezze, supra, at 78-79. Furthermore, there was no testimony as to appellant's specific difficulty in performing any of her past employ-

ment tasks due to her physical impairments. This omission's importance is emphasized by one of defendant's regulations:

> Upon request, the applicant shall also submit evidence as to his education and training, work experience, and daily activities both prior to and after the alleged date of onset of disability, efforts to engage in gainful employment or self-employment and any other pertinent evidence showing the effect of his impairment or impairments on his ability to engage in any substantial gainful activity during the time he alleges he was under a disability... 20 CFR §404.1523.

This conclusion is amply supported in the decisions of the courts. Appellant, a functionally illiterate individual with only three years of formal education (Record, Pp. 25, 26) appeared before the hearing examiner without the aid of counsel, represented only by a social worker. It is established beyond question that "[w]hen an individual appears wtihout an attorney, the hearing examiner has a duty not to be a mere umpire, but to see that all relevant facts are developed." Stewart v. Cohen, 309 F. Supp. 949 (D.C. N.Y. 1970) at 956. "In a case of this kind where a layman proceeds pro se, a greater burden is cast upon the administrative agency as well as the court to assure that the handicap of presenting evidence without assist-

ance of counsel does not obscure pertinent relevant facts which, if produced, might affect the end result. Inability to employ counsel must not be permitted to defeat the just disposition of any case. Accordingly, in a case of this kind, it is felt by the court that if a more complete and informative record over the years of plaintiff's alleged disability is established and considered, she will then have had her full day in court without impairment..." Erwin v. Sec. H.E.W., 312 F. Supp. 179, 185-186 (D.C. N.J. 1970). See also, Morse v. Gardner, infra at 624; Hennig v. Gardner, 276 F. Supp. 622, 624-625 (N.D. Tex. 1967).

Therefore, even if the court finds that the Record does not contain substantial evidence supporting appellant's claim for disability benefits, the proper disposition is a remand to permit the supplementation of the Record with this vital evidence. This will insure that "upon final disposition of appellant's claim, whether in her favor or not, no relevant fact, favorable or unfavorable to her claim, has been omitted and not considered." Erwin v. Sec. H.E.W., supra at 186.

(2)

Vitally Important Records Are Illegible.

Furthermore, many of the medical records included in the record are illegible, either because of the poor quality of the reproduction, the handwriting of the physician, or both. Pages 84, 93, 94, 100, 121, 132, and 133 of the Record are illegible in whole or in part.

The court in Machen v. Gardner, 319 F. Supp., 1243, 1245 (E.D. Tenn. 1968), when faced with the same problem, resolved the matter by holding:

> The medical evidence supplied by Dr. Preas...is a classic example of the illegible handwriting of medical doctors... In a matter of such grave importance to the plaintiff, the court believes that the evidence provided by Dr. Preas requires clarification and supplementation... The court does not yet imply that the Hearing Examiner intentionally disregarded the diagnosis...merely that the court cannot comprehend how the examier could come to any reasonable conclusion as to its weight and effect in the present state of the record.... This action is remanded to the defendant for further proceedings and consideration. The testimony of Dr. Preas will be taken on oral examination.

Clearly, the same result is necessary here.

Thus, if the court cannot find for claimant on the record as presented, it should adopt the disposition

of the court in Hamm v. Richardson, 324 F. Supp. 328, 331 (N.D. Miss. 1971):

> It appears to the court that even if the Secretary's decision that plaintiff is not disabled might technically be considered to be supported by substantial evidence as to require affirmance, we do not reach the question. In view of the inconclusive nature of the medical evidence against disability...and since plaintiff... was not represented by counsel at the administrative hearing and not even present when the Appeals Council reversed the Hearing Examiner's decision, it is the opinion of the court that the interests of justice would be best served by remanding this case to the Secretary...for the hearing of additional evidence.

VI. CONCLUSION

The Social Security Act should be liberally construed in favor of a party seeking benefits; the policy is to include rather than exclude disability claimants, White v. Finch, 311 F. Supp. 307 (D.C. Mass. 1970), Davidson v. Gardner, 370 F.2d 803 (6th Cir. 1966). "An agency official, simply out of respect for the nature of this Act, should be reluctant rather than zealous to deny benefits where there is any indication that a claimant may be entitled to them." Morse v. Gardner, 272 F. Supp. 618, 624 (E.D. La. 1967). Furthermore, it is important that a court of review remain "mindful that in a case in which the claimant is handicapped by lack of counsel, ill health, and inability to speak English well, the courts have a duty to make a 'searching examination' of the record...particularly [when]...the attitude of the examiner as revealed in the transcript hardly measured up to his statutory duty." Gold v. Secretary, supra.

The decision that the appellant is not disabled is in fact against the overwhelming weight of evidence in the Record, and should be reversed.

In the alternative, the matter should be remanded for a new hearing.

Respectfully submitted,

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Dated: Brooklyn, New York
April 8, 1974.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAZEL CUTLER, Appellant, - against - CASPAR WEINBERGER, as Secretary of the Department of Health, Education, and Welfare of the United States of America, Appellee.	Index No. 74-1093 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROLF OLSEN, Jr., being duly sworn, deposes and says:

Deponent is not a party to the within action, is over 18 years of age and resides within the City, State and County of New York.

That on the 15th day of April, 1974, deponent served the within BRIEF OF THE APPELLANT upon George Weller, Esq., Assistant United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, the address designated by said attorney for that purpose by depositing two true copies of same in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Rolf Olsen, Jr.
ROLF OLSEN, Jr.

Sworn to before me this
15th day of April, 1974

Jonathan A. Weiss
NOTARY PUBLIC

JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1975